[redacted]

No. [redacted]

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Plaintiffs-Appellants,

BENJAMIN E. SMITH and ROBERT WATKINS,

Intervenors-Appellants,

versus

DAMON H. PARTRIDGE, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, RUSSELL B. WILLIS, individually and as Member of the Louisiana State Police Department, JIMMIE H. DAVIS, individually and as Governor of the State of Louisiana, JACK P. F. GREMILLION, individually and as Attorney General of the State of Louisiana, COLONEL THOMAS D. BUCKNER, individually and as Commanding Officer of the Division of Louisiana State Police, and JIM GARRISON, individually and as District Attorney for the Parish of Orleans, State of Louisiana,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION TO DISMISS OR AFFIRM AND BRIEF FOR THE APPELLEE IN OPPOSITION

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ORTLIEB PRESS — BATON ROUGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 941

JAMES A. DOMBROWSKI, et al,

v.

JAMES H. PFISTER, et al:

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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MOTION TO DISMISS OR AFFIRM

QUESTION PRESENTED FOR REVIEW

Does a federal District Court have the authority to refrain from issuing an injunction, sought on the ground of the unconstitutionality of a state statute, against a state criminal prosecution under that statute, pending a decision of the courts of the state on the issues, where there has been no allegation that full and fair consideration will not be given in the state courts, or of extreme hardship other than the burden of a criminal defense?

STATEMENT OF THE CASE

Appellants James A. Dombrowski, Executive Director of the Southern Conference Educational Fund, Inc., and the corporation itself, filed suit in the United States District Court for the Eastern District of Louisiana, New Orleans

Division, for an injunction against the enforcement against them of the Louisiana Subversive Activities and Communist Control Law, claiming that this statute was violative of the rights, privileges and immunities guaranteed to them under the Constitution and laws of the United States. A three-judge court was convened pursuant to Title 28, Section 2281 of the United States Code. The court, after hearing argument, ordered the suit dismissed, without hearing evidence as to the asserted unconstitutional application of the statute to the appellants. The court held that it should not enjoin the enforcement of the state statute pending a determination by the courts of the state on the legal issues. Criminal prosecutions against appellants Dombrowski, Smith and Waltzer for violation of the statute have been initiated, and are scheduled for trial during June or July 1964.

ARGUMENT

Appellants pose eight questions as presented by this appeal, relating to the constitutionality of the state statute as applied to appellants, and the power of the court below to enjoin the prosecution of certain of the appellants under the statute. However, the decision of the court below rested not on a finding that the statute was constitutional as applied to appellants, but on its determination that it should not rule on the constitutional issues until the courts of the state had had an opportunity to do so. Therefore, the real issue in this appeal is whether the court below had the authority to defer to the state courts.

The Court has been presented a jurisdictional statement posing a number of constitutional issues relating to a state statute which have not been passed upon, either by any court in the State of Louisiana, or by the court below. As said by the dissenting judge below:

> "The Court declined to act on the constitutional issues the case presents, and refused to plaintiffs an opportunity to offer evidence in proof of their cases." (Jurisdictional Statement, page 15a) "The majority opinion does not discuss any of the substantial constitutional issues the complaint raises." (Jurisdictional Statement, page 21a)

In connection with a preliminary consideration of the continuation of a temporary restraining order issued by one member of the court below, the court did tentatively determine that the statute was not unconstitutional on its face, and the majority opinion discusses whether the federal Smith Act and Internal Security Act supersede any state action in the field of subversion, as the basis for a preliminary finding that the state had authority to act in that area. (See *Stefanelli* v. *Minard*, 342 U.S. 117, 120.) However, the court based its decision primarily on the desirability of equitable abstention on the part of the federal courts under the circumstances, and in light of its position in this respect considered it unnecessary to hear evidence intended to establish that the statute as applied was unconstitutional, or that the state's manner of applying of the Statute was unconstitutional.

The effect of this was to produce a record barren of any evidence. The strongly worded opinion of the dissenting judge was based solely on the allegations of the appellants, without evidence in support of those allegations having been presented. Rather than awaiting the outcome of the prosecutions, wherein all the constitutional and legal issues posed by appellants in their jurisdictional statement could be considered based on a full record in the trial court, appellants chose to appeal to this Court at this stage. It is true that appellants will be required to suffer the expense, embarrassment and strain of criminal prosecutions which would perhaps be avoided if this Court were to undertake to determine at this point whe-

ther the statute is unconstitutional. However, this is not the type of irreparable injury which would permit the federal courts to exercise their equitable jurisdiction to restrain state criminal proceedings. *Stefanelli* v. *Minard*, supra. As the Court said in that opinion (page 121):

> "Only last term we restated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to repeal the federal system'. *Collins* v. *Hardyman*, 341 U.S. 651, 658, 71 S. Ct. 937, 940, 95 L. Ed. 1253. Discretionary refusal to exercise equitable power under the Act to interfere with State criminal prosecutions is one of the devices we have sanctioned for preserving the balance."

The Court followed its earlier decision in *Douglas* v. *City of Jeannette*, 319 U.S. 157, where it had said (page 163):

> "Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance in which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction."

Congress has enacted the following provision in the Judicial code (28 U.S.C. §2283):

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

An examination of Sections 2281 and 1343 of Title 28, and Sections 1983 and 1985 of Title 42 of the United States Code, on which appellants rely, fails to indicate that Congress has expressly authorized the granting of injunctions to stay state court proceedings. The general language of the Civil Rights Act, allowing equitable actions in federal court to enforce constitutional rights, does not supply the specificity required by Section 2283. Thus this is not simply a matter of judicial administration, but one of statutory limitation on the power of federal courts in this type of situation.

In any event, there is nothing in the record in the court below to indicate irreparable injury as the basis for the exercise of equitable jurisdiction, even if the statutory prohibition did not exist. Neither is there any assertion that the courts of the State of Louisiana will not give full and fair consideration to the legal and constitutional issues posed by appellants. The record of the Supreme Court of Louisiana in this very area suggests to the contrary. *State* v. *Jenkins*, 236 La. 300, 107 So. 2d 648.

It is respectfully submitted that this case in its present posture presents no important federal issue not decided by the Court in the cases mentioned above, and reviewed as recently as the 1962 Term in *Cleary* v. *Bolger*, 371 U.S. 392, where it held that federal equitable jurisdiction could not be invoked for the purpose of enjoining unconstitutional actions of federal government officers in connection with a state prosecution.

If the Court should feel that the record below is sufficient to permit the consideration of the constitutional issues posed by appellants, and that the court below was without authority to defer to the state courts, there is still a practical matter to be considered. As the Court said in its footnote to the opinion in the *Stefanelli* case, on page 123, Congress has demonstrated that orderly consideration of judicial proceedings should not be broken up by piecemeal determination of issues. The record in this Court is devoid of any evidence relating to the unconstitutional application of the statute to appellants, this point having been made as the fourth question presented by the appeal in appellants' jurisdictional statement. In order to consider this issue properly, the Court would be required to return the case to the court below for the taking of evidence. Meanwhile, the prosecutions are proceeding, and will be reached for trial in June or July of this year. Under Article 7, Section 10 of the Constitution of the State of Louisiana of 1921, direct appeal is provided to the Supreme Court of the State in criminal cases on questions of law when a fine of over $300.00 or imprisonment of over six months is imposed. Section 365 of the statute under consideration, found at page 49a of appellants' jurisdictional statement, indicates the punishment provided for violations of the statute, ten thousand dollars maximum fine and imprisonment at hard labor for not more than ten years, so that in the event of conviction it is probable that direct appeal to the Supreme Court of the State can be taken. Under Title 15, Section 542 of the Revised Statutes of the State of Louisiana, appeal to the Supreme Court of the State of Louisiana must be made in ten days. Thus the appeal will probably be heard in the State Supreme Court in the fall, and in all likelihood before this Court can hear argument on this appeal. There will then be a full record on the issues posed in the jurisdictional statement herein, and especially as to the unconstitutional application of the statute to appellants, and an appeal to this Court

from the decision of the Supreme Court of the State may well raise additional issues. The consideration of the case in the posture of the present appeal will simply lead to piecemeal consideration of the constitutional issues posed by appellants. Of course, if appellants are acquitted in the criminal prosecution this spring, the present appeal will be rendered moot.

Under these circumstances, would it not be preferable to permit the criminal prosecution to proceed, and let any appeal to this Court be based on a record which encompasses all the issues that can be raised by appellants, and where, if the Court grants the appeal, it may not be mooted by acquittal in the state courts?

Should the Court decide to consider the appeal on the single issue properly before it, namely, the authority of the court below to refuse injunctive relief to appellants against state court action, it is suggested that by the time the Court can hear and decide that issue, some time during the fall or winter of 1964, the criminal trial, and very possibly the appellate procedure in the State Supreme Court, will have been completed, so that the expense, strain and embarrassment involved in the prosecution will have been borne, and any injunction granted at that stage will be unavailing to appellants.

A final consideration lies in the expression of policy set forth in the *Stefanelli* opinion (page 120) as to the exercise of federal discretionary equitable jurisdiction over state action, that "the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law," an area where the Court should at the very least be certain that its

accepting jurisdiction will serve an effective purpose, and will provide the Court an opportunity to give careful consideration to every aspect of the subject. It is respectfully submitted that the posture of this case and the extent of the record before the Court in that posture, will permit neither.

Accordingly, the appeal should be dismissed, and the judgment below affirmed.

Respectfully submitted,

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I certify that a copy of the foregoing motion and brief has been served upon plaintiffs-appellants by mailing same to their counsel of record.

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